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Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1781

JULIO MOREJON-PACHECO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Julio Morejon-Pacheco, respectfully prays that a writ of certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 4, 1980, and on March 10, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, reported as *United States v. Aguiar,* 610 F.2d 1296 (5th Cir. 1980) appears in the Appendix attached hereto. (Appx. pp. 8-28) The Court of Appeals denied the petitions for rehearing and rehearing *en banc* in a *per curiam* order dated March 10, 1980. (Appx. p. 30)

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 4, 1980. A timely petition for rehearing and petition for rehearing *en banc* was denied without an opinion on March 10, 1980. For good cause shown, this Honorable Court extended the time for filing the present petition for a writ of certiorari until May 9, 1980. This Court's jurisdiction is invoked under Title 28, U.S.C.A. §1254(1).

QUESTIONS PRESENTED

Whether the Court of Appeals erred by disposing of the petitioner's Fourth Amendment claim on the basis of standing where the government conceded standing at every stage of the proceedings below and the issue of standing was never briefed or argued on appeal by the government.

Whether the Court of Appeals erred in concluding that the petitioner did not have standing where the indictment specifically charged him with possession of the seized contraband and the record clearly reflects

that he was in possession at the time of the search and seizure.

STATUTORY PROVISIONS INVOLVED

Title 21, U.S.C.A. §841(a)(1).

Title 21, U.S.C.A. §846.

STATEMENT OF THE CASE AND FACTS

This petition arises out of the opinion and judgment of the Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Southern District of Florida. The petitioner, Julio Morejon-Pacheco, was indicted along with ten other co-defendants. (R.I, pp. 1-5; 131-136.) The petitioner was tried and convicted on all five counts alleged in the second superseding indictment. (R.I, pp. 131-136.)

Count I charged a conspiracy to possess with the intent to distribute cocaine in violation of Title 21, U.S.C.A. §841(a)(1); Title 21, U.S.C.A. §846; and Title 18, U.S.C.A. §2. Count II charged the petitioner with the distribution of an unspecified amount of cocaine in violation of Title 21, U.S.C.A. §846 and Title 18, U.S.C.A. §2. Count III charged the petitioner with possession with the intent to distribute 448 grams of cocaine in violation of Title 21, U.S.C.A. §841(a)(1) and Title 18, U.S.C.A. §2. Counts IV and V charged the petitioner with the knowing use of a communications facility in furtherance of a felony in violation of Title 21, U.S.C.A. §843(b). (R.I, pp. 131-136.)

Prior to the trial, the United States Magistrate held a hearing on the petitioner's motion to suppress the 448 grams of cocaine he is charged with possessing under Count III of the indictment. (Appx. p. 24) Based upon the fact that the government did not contest the petitioner's standing to make a motion to suppress the Count III cocaine, the Magistrate heard evidence on the merits of the Fourth Amendment question presented. The Magistrate found that the search and seizure was valid under a very narrow warrant exception and recommended denial of the motion to suppress the 448 grams of cocaine. On appeal, the only Fourth Amendment question briefed and argued by the parties was the reasonableness of the warrantless search in this case. (Appx. p. 6) (Appx. p. 24) The question of standing was expressly conceded by the government at the hearings below and was not raised on appeal. (Appx. p. 3)

The district court accepted the Magistrate's recommendation and proceeded to deny the petitioner's motion to suppress the seized cocaine.[1] The government's failure to raise the question of standing and the ultimate concession thereof foreclosed any offer of evidence or that question to the Magistrate or to the district court. The district court's memorandum opinion clearly notes that the government had conceded the question of the petitioner's standing to contest the seizure of the Count III cocaine he is charged with

[1]Local Rule 25(c)(2) of the District Court for the Southern District of Florida provides that the Magistrate may conduct evidentiary hearings on a motion to suppress evidence seized during an alleged unlawful search, but the final decision thereon shall be by the district court.

possessing. (Appx. p. 3) *United States v. Morejon-Pacheco,* 446 F.Supp. 83 (S.D. Fla. 1978).

On appeal to the Fifth Circuit Court of Appeals, the petitioner raised numerous issues, to wit: improper comment upon the petitioner's failure to testify at trial; the trial court's abuse of discretion in failing to sever the petitioner's trial from the co-defendants with antagonistic defenses; the trial court's erroneous denial of the petitioner's motion for new trial based upon newly discovered evidence of governmental misconduct and the suppression of favorable exculpatory evidence; and the erroneous denial of the petitioner's motion to suppress the 448 grams of cocaine he is charged with possessing under Count III of the indictment. (Appx. p. 24)

For the purposes of the instant petition, the main issue presented is the erroneous manner in which the Court of Appeals raised the question of standing *sua sponte* and then decided the Fourth Amendment issue without reaching the merits of the claimed error. (Appx. p. 25) Subsequent to the Court of Appeals' opinion, the petitioner timely filed a petition for rehearing and a petition for rehearing *en banc* which was limited to the issues presented herein, to wit: the procedural error of raising and deciding a question not raised on appeal and upon which the petitioner had no opportunity to present evidence below and the substantive standing question itself. Said petitions for rehearing and rehearing *en banc* were denied without an opinion in a *per curiam* order on March 10, 1980. (Appx. p. 30)

The relevant facts adduced below reflect that the Drug Enforcement Administration had conducted an

undercover operation which began in April of 1977 and ended on July 18, 1977, the date of the petitioner's arrest and the contested search and seizure. (Appx. pp. 13-14)[2] After several months of negotiations between the DEA agents and the defendants below, the petitioner, Morejon-Pacheco, agreed to take agent Jezzeny to the home of a co-defendant for the purpose of weighing and testing the cocaine that the agents were to purchase. One of the co-defendants had simultaneously taken agent Fonte to another house for the purpose of showing the sellers the money they were to receive from the cocaine sale. The date of these events was July 18, 1977. (Appx. p. 13) (R.VI, pp. 431, 627.)

The record reflects that when the petitioner and agent Jezzeny entered the house, co-defendant Virgen Palenzuela led them to a back bedroom where she produced a box containing five and one-half (5½) kilograms of cocaine. She also produced a bag from a bathroom drawer which contained the 448 grams of cocaine that became the subject of the petitioner's motion to suppress below. (Appx. p. 15) (R.VI, pp. 631-632; R.IV, pp. 16-17.) Before the sale could be consummated, agent Jezzeny and Morejon-Pacheco received a telephone call from agent Fonte who told them something had gone wrong at the money house and that a meeting was necessary. (Appx. p. 14) (R.VII, pp. 651-661.)

Before agent Jezzeny and the petitioner left Virgen Palenzuela's house, two of the co-defendants, Mr. and

[2]Accepting the statement of facts in the Court of Appeals' opinion as accurate, the facts set forth herein will be restricted to the events immediately preceding the contested search and seizure. (Appx. pp. 13-15)

Mrs. Torres, removed the five and one-half (5½) kilograms but the petitioner left the 448 gram bag of cocaine with Mrs. Palenzuela. (Appx. p. 14) (R.VII, pp. 656-658; R.IV, pp. 31-32.)

Upon leaving Mrs. Palenzuela's house with agent Jezzeny, the petitioner was placed under arrest by agents Fonte, Jezzeny and other officers. (Appx. p. 14)(R.VII, pp. 662-663.) Subsequent to the petitioner's arrest, the DEA agents and eight or more City of Miami police officers went back to the Palenzuela house to arrest the co-defendants. (Appx. p. 14) (R.IV, pp. 35-39.) The elapsed time between the arrest of the petitioner and the contested search and seizure was twenty-five (25) minutes. (Appx. p. 14) (R.IV, p. 35.)

Although all of the co-defendants were arrested in the front yard of the Palenzuela house, the agents proceeded to enter the house and conduct a systematic warrantless search. (Appx. p. 15)(R.IV, pp. 43, 53, 57, 81.) After a twenty-minute search of the house, the eight agents and officers recovered the 448 grams of cocaine from a drawer in a back bathroom. (Appx. p. 15)(R.IV, pp. 45-46.) Said search was conducted despite the agents' admission that there were more than enough

officers to secure the premises until a warrant could be obtained. (R.IV, pp. 84-86.)[3]

It is significant to note that Count III of the indictment specifically alleges that on or about July 18, 1977, the date of the contested search and seizure, the petitioner knowingly possessed the 448 grams of cocaine seized from the Palenzuelas' house moments after he left and was placed under arrest. (Appx. p. 3) It is also significant to note Virgen Palenzuela's trial testimony in which she stated that all of the cocaine that she showed to agent Jezzeny belonged to the petitioner, Morejon-Pacheco. (Appx. p. 15) (R.VII, pp. 805, 831-836, 850.) The Court of Appeals' opinion correctly notes that Virgen Palenzuela testified that she had no idea what was in the packages and that she was only doing a favor for her friend, the petitioner. (Appx. p. 15, N. 8.) (R. VIII, pp. 800-806.) Both the five and one-half (5½) kilograms in the box that she gave back to Mr. and Mrs. Torres and the 448 gram bag of cocaine in issue here belonged to the petitioner according to Virgen Palenzuela and the indictment itself. (Appx. p. 15) Despite the facts noted herein, the Court of Appeals ruled that the petitioner did not have standing to contest the search and seizure and did not reach the merits of the petitioner's claim of constitutional error. This petition for a writ of certiorari follows.

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[3]The district court ruled that the warrantless search in this case was permissible under a very narrow search warrant exception recently formulated by the Fifth Circuit Court of Appeals. This exception to the controlling law of *Vale v. Louisiana*, 399 U.S. 30 (1970), permits a "cursory" check of the premises for armed persons *if* the officers have a reasonable belief that unknown confederates pose an immediate threat to their safety. This issue was never reached by the Court of Appeals because of the erroneous conclusion that the petitioner lacked standing to contest the search and seizure.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS VIOLATED THE PETITIONER'S RIGHT TO DUE PROCESS BY DISPOSING OF HIS FOURTH AMENDMENT CLAIM ON THE BASIS OF STANDING WHERE THE GOVERNMENT CONCEDED STANDING AT EVERY STAGE OF THE PROCEEDINGS BELOW AND THE QUESTION OF THE PETITIONER'S STANDING WAS NEVER RAISED ON APPEAL BY THE GOVERNMENT.

It is submitted that the issues presented by the instant petition are of far-reaching significance because the procedure employed by the Court of Appeals has resulted in a denial of due process regarding the determination of the petitioner's claim of an illegal search and seizure. As noted above, the government had never raised the question of standing before the district or appellate courts. The trial judge's memorandum opinion noted the government's concession of the petitioner's standing before ruling upon the merits of the Fourth Amendment claim. (Appx. p. 3)

On appeal, neither the government nor the petitioner raised the issue of the petitioner's standing to contest the search and seizure. Notwithstanding the fact that standing was conceded by the government and the district court, the Court of Appeals avoided the merits of the Fourth Amendment claim against the petitioner on

the basis of standing. (Appx. p. 24) Such action by the Court of Appeals rises to the level of a denial of due process because the posture in which the case reached the appellate level prevented the petitioner from introducing any evidence of his standing to contest the search and seizure in the trial court.

It is submitted that had the government and/or the trial court contested the Petitioner's standing, he would have had the opportunity and the inclination to testify at the suppression hearing under the guidelines of *Simmons v. United States,* 390 U.S. 377 (1968). *Simmons* holds that a defendant may testify at a suppression hearing to establish his standing to contest the search and seizure, but the government cannot use said testimony against the defendant in its case-in-chief. *Id.* at pp. 390-394. The Court of Appeals has caused the petitioner to be the victim of a deception by disposing of his constitutional claim on the basis of standing when the government conceded the question of standing at all times.

The opinion of the Court of Appeals in this case sets two disturbing precedents. First, it encourages a prosecutorial practice of conceding the question of standing below when the government knows that said tactic will serve to prevent the defendant from making a full and complete appellate record. Second, once this tactic becomes widespread, it will *force* the defendant to testify at pretrial suppression hearings, thereby creating a chilling effect upon his constitutional right to testify in his own behalf at trial. This is so because although *Simmons, supra,* does prevent the use of the defendant's suppression hearing testimony as evidence-in-chief, the

government can still use it to attempt to impeach the defendant if he testifies at trial and to possibly prosecute him for perjury if his trial testimony is inconsistent. It is a denial of due process to force a criminal defendant to forsake one constitutional right to preserve another. *Simmons v. United States,* at p. 394. *Garrity v. State of New Jersey,* 385 U.S. 493 (1967); *Nadeau v. Helgemoe,* 423 F.Supp. 1250, 1261 (D. N.H. 1976), 561 F.2d 411 (1977); 581 F.2d 275 (1978).

With regard to the question of what issues are properly before the Court of Appeals, the Supreme Court has stated:

> "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering,* 312 U.S. 552, 556, 61 S.Ct. 719, 721, 83 L.Ed. 1037 (1941), the Court explained that this is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have no opportunity to introduce evidence.' " *Singleton v. Wulff,* 96 S.Ct. 2868, 2877 (1976).

It is precisely the danger recognized by this Court in *Singleton, supra,* that confronts the Court now. The failure of the government to properly raise the question of standing below precludes the Court of Appeals from raising and passing upon the question because the petitioner has been denied the opportunity to introduce

evidence relevant to the question of standing. See, *Rakas v. Illinois,* 99 S.Ct. 421, 422 (N. 1) (1978); and *Combs v. United States,* 92 S.Ct. 2284 (1972).

In *Combs v. United States, supra,* this Court held that the Court of Appeals had erred in denying the defendant's Fourth Amendment claim on the basis of standing. The reasoning of the Court was that *Combs* had not introduced any evidence because, as here, the government did not raise the question of standing in the trial court. *Id.* at p. 2286. In *Combs, supra,* the Court remanded the case to the trial court for an evidentiary hearing on the question of standing. It is submitted that as announced in *Rakas v. Illinois, supra,* standing is no longer an issue of separate inquiry but a part of the substantive Fourth Amendment question itself. Hence, the government's concession of standing waives the question forever because it is not a jurisdictional issue. *United States v. Emery,* 541 F.2d 887 (1st Cir. 1976); *United States v. Whitaker,* 592 F.2d 828, 829 (5th Cir. 1979); *United States v. Edmonds,* 611 F.2d 1386 (5th Cir. 1980); *Barrows v. Jackson,* 346 U.S. 249 (1953).

In *United States v. Emery, supra,* the government failed to raise the question of standing in any form before the district court. Although the government did raise the question of standing on appeal, the Court of Appeals refused to consider the question of standing because the government had waived it below. 541 F.2d at p. 889. In the present case, the government did not raise the question of standing at all — below or on appeal.

In *United States v. Whitaker,* 592 F.2d 826 (5th Cir. 1979), the Court of Appeals expressed doubts about the

defendant/appellant's standing to raise the search and seizure issue. Despite its own reservations about the defendant's standing, the court proceeded to rule upon the merits of the Fourth Amendment claim because the question of standing had gone unlitigated below. *Id.* at p. 828 (N. 2). As in *Whitaker, supra,* the Court of Appeals must accept the issues in the same manner as they came to the court and rule upon the merits of the Fourth Amendment claim.

The general rule of the scope of appellate review announced in *Singleton, supra,* applies with even greater force in this case because the question of standing was expressly conceded by the government at all stages only for it to be raised *sua sponte* by the Court of Appeals. As the court stated in *United States v. Patrin,* 575 F.2d 708 (9th Cir. 1978):

> "As a general rule, 'a federal appellate court does not consider an issue not passed on below.' (Citation omitted.) It is immaterial whether the issue was not tried in the district court because it was not raised or because it was raised but conceded by the party seeking to revive it on appeal." *Id.* at p. 712.

The facts of the present case go beyond *Singleton* and *Patrin, supra,* because the petitioner was further unable to face the question when the government did not raise it on appeal either. This principle of limited appellate review has been reaffirmed by this Court on numerous occasions. *Singleton v. Wulff,* 96 S.Ct. 2868 (1976); *Hormel v. Helvering,* 61 S.Ct. 719 (1941); *Youakim v. Miller,* 96 S.Ct. 1399 (1976); *Dorszynski v. United States,* 94 S.Ct. 3042 (1974).

Virtually every federal circuit has also followed the general rule that an appellate court will not consider issues that were not presented to the district court. *Needleman v. Bohlen,* 602 F.2d 1 (1st Cir. 1979) — appeal from suit by dismissed teacher under Title 42, U.S.C.A. §1983; *United States v. Emery,* 541 F.2d 887 (1st Cir. 1976) — appeal from denial of motion to suppress contraband evidence; *United States v. Bazzano,* 570 F.2d 1120 (3d Cir. 1977) — appeal from criminal conviction for illegal gambling; *United States v. Moore,* 453 F.2d 601 (3d Cir. 1971) — appeal from a criminal conviction; *Response of Carolina, Inc. v. Leasco Response, Inc.,* 537 F.2d 1307, 1324 (5th Cir. 1976) — civil anti-trust litigation; *Mayberry v. Davis,* 608 F.2d 1070 (5th Cir. 1979) — court of appeals refused to consider state prisoner's claims that were not presented to the district court; *Messelt v. Alabama,* 595 F.2d 247 (5th Cir. 1979) — court of appeals refused to consider the question of lack of exhaustion of state remedies because the state did not challenge the state habeas corpus petitioner on that issue in the district court; *King v. United States,* 565 F.2d 356 (5th Cir. 1978) — appeal from denial of relief for a federal prisoner under Title 28, U.S.C.A. §2255; *United States v. Chapman,* 549 F.2d 1075 (6th Cir. 1977) — appeal from a criminal conviction; *United States v. Russell,* 585 F.d 368 (8th Cir. 1978) — arguments not raised by criminal defendant in district court would not be heard by court of appeals; *United States v. Patrin,* 575 F.2d 708 (9th Cir. 1978) — appeal from a criminal conviction; *United States v. Oakes,* 564 F.2d 384 (10th Cir. 1977) — appeal from a criminal conviction in which motion to suppress seized evidence was an issue.

The action of the Court of Appeals in the present case has worked a manifest injustice upon the petitioner because the failure of the government to challenge his standing below effectively prevented him from introducing any evidence on that question. It is precisely this danger that the above cited cases jealously guard against. The Court of Appeals' opinion states that: "Because Morejon does not claim and the record does not indicate that the indictment charged him with possession at the time the search occurred, he lacks standing to challenge its legality." (Appx. p. 25) The petitioner had no opportunity to take the stand under *Simmons, supra,* claim ownership of the contraband, and establish his expectation of privacy in the premises searched because the government conceded standing and the district court accepted the government's concession as valid. (Appx. p. 3) The action or non-action of the government cannot be used to deprive the petitioner of a full and fair review of his Fourth Amendment claim.

It is respectfully submitted that it does not matter whether it is the opposing party or the court who raises an issue that was not litigated below by the parties. The issue of standing was not litigated below despite the fact that the government had the opportunity to challenge standing. In this posture of the case, the Court of Appeals erred by raising the question of standing *sua sponte* and then deciding the petitioner's Fourth Amendment claim on that basis.

II.

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE PETITIONER DID NOT HAVE STANDING WHERE THE INDICTMENT SPECIFICALLY CHARGED HIM WITH POSSESSION OF THE SEIZED CONTRABAND AND THE RECORD CLEARLY REFLECTS THAT HE WAS IN POSSESSION AT THE TIME OF THE SEARCH AND SEIZURE.

In the present case, the Fifth Circuit Court of Appeals has not questioned the continued vitality of the automatic standing rule announced in *Jones v. United States,* 362 U.S. 257 (1960). Rather, the Court of Appeals held that the petitioner lacked standing because he was not charged with possession of the cocaine at the time of the search and seizure. (Appx. p. 25)

As noted by this Court in *Rakas v. Illinois,* ____ U.S. ____, 99 S.Ct. 421, 426 n.4 (1978), the *Jones* rule of automatic standing has not been overruled as it applies to cases in which the defendant is charged with possession of the seized contraband. However, the petitioner is aware of the fact that this Court is presently considering the continued vitality of the *Jones* rule in the recently argued case of *United States v. Salvucci,* 599 F.2d 1094 (1st Cir. 1979); *cert. granted,* 100 S.Ct. 519 (1979).

Because the outcome of the *Salvucci* case could have a material impact upon the argument of this petitioner, we must necessarily adopt the arguments of

the *Salvucci* respondents in favor of retaining the *Jones* rule of automatic standing. In addition to the *Jones* automatic standing argument, the petitioner submits that he had actual standing to contest the search and seizure in the present case. Accepting the language in *Rakas v. Illinois, supra,* the petitioner did have a legitimate expectation of privacy in the 448 grams of cocaine which Virgen Palenzuela testified that he entrusted to her for safekeeping. (R.VIII, pp. 831-836, 850.) (Appx. p. 8) Hence, even if this Court overrules *Jones* in the *Salvucci* case, the petitioner would still have standing to contest the search and seizure. *See, Mancusi v. DeForte,* 392 U.S. 346, 88 S.Ct. 2120 (1968).

Briefly stated, the petitioner submits that the *Jones* rule of automatic standing should not be abandoned for precisely the same reasons that it was originally formulated, to wit: to avoid the perils of self-incrimination and the vice of prosecutorial self-contradiction. The principal case that arguably erodes the automatic standing rule of *Jones* is *Simmons v. United States,* 390 U.S. 377, 88 S.Ct. 967 (1968). *Simmons, supra,* holds that if the defendant testifies at the suppression hearing, his testimony will not be directly admissible against him on the issue of guilt or innocence. *Id.* at p. 976.

It is submitted that the retreat from the *Jones* rule in *Simmons* did not cure the underlying chill on the defendant's ability to take the stand at trial after he has testified at the hearing on the motion to suppress. In the case of *People v. Sturgis,* 58 Ill.2d 211, 317 N.E.2d 545 (1974), the Illinois Supreme Court held that *Simmons* did not preclude the prosecution from using the

defendant's suppression testimony for impeachment purposes. In reaching this conclusion, the Illinois court relied upon this Court's decision in *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643 (1971). *Harris, supra*, held that the government could impeach the defendant with his prior statements even though said statements were rendered otherwise inadmissible by *Miranda v. Arizona*, 384 U.S. 436 (1966).

Although this Court has not yet ruled upon the question raised by *Sturgis, supra*, the probability that the defendant's suppression testimony will be used for impeachment purposes is high because the suppression testimony is voluntary — not compelled testimony. *See, New Jersey v. Portash*, ____ U.S. ____, 9 S.Ct. 1292 (1979). The very real danger that the suppression testimony will arm the prosecution with impeachment evidence still serves to keep the defendant from testifying at both the suppression hearing and at trial. The defendant must still surrender one constitutional right to preserve another. *Simmons v. United States*, at p. 976. Additionally, by forcing the defendant to take the stand at the pretrial suppression hearing, the courts are affording the prosecution an opportunity to develop evidence to make its case stronger. *Duncan v. State*, 276 Md. 715, 351 A.2d 144 (1976). See also, Wayne R. LaFave, *Search and Seizure, A Treatise On The Fourth Amendment*, p. 589 (1978).

The second major decision that arguably erodes the automatic standing rule of *Jones* is *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565 (1973). As will be seen below, the Fifth Circuit Court of Appeals placed a great deal of reliance upon *Brown's* limitation of *Jones*

in holding that the petitioner did not have standing to contest the search and seizure. *Jones* stands for the proposition that where possession is the charge, or an essential element thereof, the defendant has automatic standing to contest the search and seizure.

The *Brown* decision, however, added the requirement that to have automatic standing the indictment must allege that the defendant possessed the contraband *at the time of the contested search and seizure. Id.* at p. 1569. In essence, this added requirement says that if there has been a "substantial" change in the defendant's relationship to the property between the time of the charged possession and the time of the contested search, the defendant loses automatic standing. In *Brown,* the defendants had relinquished all interests in the goods *two months* before the contested search and seizure. It is this aspect of *Brown* that the Court of Appeals erroneously relied upon in holding that the petitioner did not have the standing to contest the search and seizure. (Appx. p. 25)

The Court of Appeals first states that because the petitioner does not *claim* possession of the seized contraband, he lacks standing. (Appx. p. 25) The logical response to this is found in the petitioner's first argument. Because the government conceded standing and both the magistrate and the trial judge ruled that the petitioner had standing, he had no reason to take the stand to establish that point. (Appx. p. 3)

The Court of Appeals next states that the record does not reflect that the indictment charged the petitioner with possession at the time the search

occurred. Count III of the second superseding indictment[4] specifically charges that on or about July 18, 1977, the date of the contested search and seizure, the petitioner knowingly possessed the 448 grams of cocaine seized from the Palenzuelas' house. (R.I, pp. 131-136.) The Court of Appeals totally overlooked this specific wording of the indictment.

The facts developed at the hearing on the motion to suppress and at the trial confirm that the petitioner was charged with possession at the time of the search and seizure. The record reflects that the contested search and seizure took place twenty-five (25) minutes after the petitioner left the Palenzuelas' house with Agent Jezzeny. (Appx. p. 24) (R.IV, pp. 35-37.) When co-defendant Virgen Palenzuela took the stand at trial, she testified that the 448 grams of cocaine belonged to the petitioner, Morejon-Pacheco. (Appx. p. 8; R.VII, pp. 805, 833-836, 850.) Her testimony was that the cocaine in her house belonged to the petitioner who left it with her because her house was chosen by the petitioner as the place where the cocaine would be transferred to Agent Jezzeny. (R.VII, pp. 833-836.)

The faulty analysis of the Court of Appeals is best illustrated by the legally and factually inapposite decisions cited in the opinion. (Appx. p. 25) The case of *United States v. Hodges,* 606 F.2d 520 (5th Cir. 1979), has no bearing on the issues herein. In *Hodges, supra, all* of the defendants were charged with conspiracy to possess and possession of marijuana. It is clear from the facts of the case that defendant Hodges was charged

[4]Count III of the second superseding indictment corresponds to Count II of the first superseding indictment referred to in the opinion of the district court. (Appx. p. 3)

with the substantive possession count under the vicarious liability theory established in *Pinkerton v. United States,* 328 U.S. 640 (1948). At no time was it alleged or proved that Hodges ever had actual or constructive possession of the marijuana. *United States v. Hodges,* at p. 523.

Unlike *Hodges, supra,* the Count III possession charge was based upon the petitioner's actual possession — not the *Pinkerton* vicarious liability theory. Count III specifically charges the petitioner and only five of the ten other co-defendant conspirators with possession of the 448 grams of cocaine seized from the Palenzuelas' house on July 18, 1977. (R.I, pp. 131-136.) That only six of the eleven co-conspirators were charged with possession of the 448 grams of cocaine seized from the Palenzuelas' residence makes it clear that this was not a *Pinkerton/Hodges* vicarious liability count.

The Court of Appeals' reliance on *United States v. Byers,* 600 F.2d 1130 (5th Cir. 1979) was also erroneous. In *Byers, supra,* the defendants were denied standing because they were found to have voluntarily abandoned both the vessels and the contraband prior to the search and seizure. In the present case, the record clearly shows that Morejon-Pacheco did not abandon the cocaine. Rather, he entrusted it to Virgen Palenzuela for safekeeping in her house until he and Agent Jezzeny could return to complete their transaction.

The petitioner's entrustment of the cocaine to Virgen Palenzuela was not an abandonment but a gratuitous common law bailment[5] or entrustment to his

[5]*American Heritage Dictionary* (1979). *Bailment:* The act of delivering goods or personal property to another *in trust.*

agent, Virgen Palenzuela. Although Virgen Palenzuela may have had temporary custody, under common law property concepts, the petitioner was at all times the actual possessor of the cocaine. As stated by this Court in *Rakas v. Illinois,* 99 S.Ct. 421 (1978):

> ". . . by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that amendment." *Id.* at p. 430-431, n.12.

The record here establishes that the petitioner retained both ownership and possession when he placed the cocaine in Virgen Palenzuela's house for safekeeping. The *Byers* case is also inapposite because the charge there was conspiracy, not a possessory offense. Hence, the language in *Byers, supra,* regarding abandonment is mere dicta.

Nor is the present case factually similar to *United States v. Palazzo,* 488 F.2d 942 (5th Cir. 1974), which is relied upon heavily in the *Hodges* opinion. In *Palazzo, supra,* the Court found that the defendant Viagran had voluntarily relinquished all interest in or claim to the contraband when he sold it the morning before the search and seizure of the buyers' luggage at the airport. *Id.* at p. 947. It should also be noted that the buyers were not agents of Viagran in the scheme charged. The Court reasoned that Viagran had given up all claims of possession/ownership when he sold the contraband prior to the search because he no longer had any control over it.

In the present case, unlike *Brown, supra,* there was no change in the defendant's relationship to the property between the time of the alleged possession and the time of the contested search and seizure. In fact, both the indictment and the record reveal that the charged possession was contemporaneous with the time of the contested search and seizure — the afternoon and early evening of July 18, 1977. (R.I, pp. 131-136; R.IV, pp. 35-37.)

The petitioner further submits that the "at the time of the contested search and seizure" language in *Brown v. United States, supra,* is mere dicta that has been misinterpreted by the courts. All that *Brown, Byers,* and *Palazzo, supra,* stand for is the proposition that if the defendant wilfully *abandons* the property by some affirmative act prior to the search and seizure, he has given up all claims of possession for standing purposes. There was no such abandonment by the petitioner in the present case; therefore, for the purposes of standing, he was in possession at the time of the search and seizure.

It is further submitted that notwithstanding the *Jones* concept of automatic standing, the petitioner had a "legitimate expection of privacy" in the contraband seized from the Palenzuelas' house under *Rakas'* substantive Fourth Amendment analysis. The record below reflects that the petitioner had entrusted his 448 grams of cocaine to Virgen Palenzuela for safekeeping until he could complete a sale to Agent Jezzeny (R.VII, pp. 805, 831-836, 850.) The record further reflects that Virgen Palenzuela had wilfully consented to the petitioner's request that she hold the cocaine for him until he could complete the proposed transaction.

(R.VII, p. 833.) Virgen's testimony was to the effect that the petitioner retained complete control over his property. She had no power to sell, transfer or display the cocaine to anyone other than the petitioner. (R.VII, pp. 836-837.)

The leading case on this point is *United States v. Jeffers,* 342 U.S. 48, 72 S.Ct. 93 (1951). In *Jeffers, supra,* the defendant had stored 19 bottles of cocaine in a hotel room rented by and solely for his two aunts. Although he had free access to the hotel room, the defendant did not reside there. This Court held that the defendant had a legitimate expectation of privacy in the narcotics seized during the warrantless search of the room. Hence, *Jeffers* had the requisite standing to contest the search of his aunts' room which resulted in the seizure of the narcotics he stored therein.

Since the *Jeffers* decision, this Court and other federal and state appellate courts have reaffirmed its holding that the petitioner had a legitimate expectation that his property would be free from governmental intrusion when he entrusted it to Virgen Palenzuela.[6] Hence, the petitioner had standing to contest the search and seizure because the search of the house resulting in the warrantless seizure of the petitioner's cocaine violated *his* Fourth Amendment rights. This Court's decisions in *Simmons v. United States, supra; Combs v. United States,* 92 S.Ct. 2284 (1972); *Brown v. United States, supra;* and *Rakas v. Illinois, supra,* all recognize that a defendant may establish a legitimate expectation that the area in which he stores the property will be free from governmental intrusion.

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[6]See, Wayne R. LaFave, *Search and Seizure, A Treatise On The Fourth Amendment,* Vol. 3, pp. 556-563 (1978).

In *Simmons, supra,* the defendant, charged with bank robbery, moved to suppress the contents of his suitcase which he had hidden in the basement of a house belonging to someone totally unconnected to the crime. The Court held that even though the defendant had no proprietary or possessory interest in the premises searched, he could establish a legitimate expectation of privacy (standing) in the objects seized. *Id.* at pp. 974-976.

In *Combs v. United States, supra,* the defendant was charged with possession of illicit whiskey stolen from interstate commerce. The petitioner had stored the seized contraband in a shed on his father's farm. Because standing was not litigated below, this Court remanded the case for said determination. One of the avenues implicitly left open was that the defendant could establish standing vis-a-vis his interest in the goods stored on his father's premises and his expectation that the storage shed would be free from government intrustion.

In *Brown v. United States, supra,* the Court held that the defendants did not have standing and affirmed the denial of the motion to suppress the goods seized from Knuckles' store. However, the Court specifically noted that the petitioners *"alleged no proprietary or possessory interest in Knuckles' premises or in the goods seized there."* *Id.* at p. 1567. The Court did not rule upon the argument that the defendants had a protected

interest in the goods because it was not raised at the district or circuit court levels. *Id.* at pp. 1569-1570, n.4.[7]

Finally, in *Rakas v. Illinois, supra,* this Court again addressed the *Jeffers* question without having to rule on it because the petitioners did not assert that they owned the rifle or the shells that were seized. *Id.* at p. 423. The *Rakas* opinion leaves no doubt that had the petitioners properly asserted an ownership or possessory interest in the objects seized, that a "legitimate expectation of privacy" could be established. In any event, the *Rakas* opinion recognizes the continued vitality of *Jeffers* legitimate expectation of privacy in the objects seized. *Id.* at p. 426.

Unlike a claim of automatic standing under *Jones, supra,* the petitioner, Morejon-Pacheco, has suffered a violation of *his* Fourth Amendment rights, not those of a third party. As in *Mancusi v. DeForte,* 88 S.Ct. 2120 (1968), despite the fact that Virgen Palenzuela had knowledge of and access to the 448 grams of cocaine, society recognizes his legitimate expectation that the goods seized would be free from governmental intrusion. *Id.* at pp. 2123-2124. The *Rakas* opinion also makes it clear that on our facts, the petitioner's legitimate expectation of privacy is bolstered by his ownership, possession, and control over the seized contraband in this case. *Id.* at p. 430, n.12.

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[7]It is anticipated that the government would rely upon language in footnote 4 to argue that one cannot have a legitimate expectation of privacy in narcotics. This argument was expressly rejected in *United States v. Jeffers, supra.* See also, Wayne R. LaFave, *Search and Seizure,* Vol. 3 at p. 559, n.72. (1978).

As the commentators have noted, under *Jeffers* and its progeny, the petitioner has met the substantive expectation of privacy test of *Rakas v. Illinois, supra.*

> "An individual's right to privacy from governmental intrusion into his personal effects does not require that he have physical control of the property. He can reasonably expect that his lawfully possessed 'effects' will remain undisturbed upon premises where they have been lawfully placed or in the custody of a third party to whom they are lawfully entrusted. If, however, the individual places his effects upon premises where he has no legitimate expectation of privacy (for example, in an abandoned shack or as a trespasser upon another's property), then he has no legitimate reasonable expectation that they will remain undisturbed upon these premises." LaFave, *Search and Seizure,* Vol. 3, pp. 560-561 (1978).

Citing to, Gutterman, *"A Person Aggrieved:" Standing to Suppress Illegally Seized Evidence in Transition,* 23 Emory L.J. 111, 119 (1974).

In the present case, the record clearly establishes that the petitioner did *not* relinquish dominion and control over his property when he entrusted it to Virgen Palenzuela. The Court's attention is also directed to several other decisions in which standing was predicated on the defendant's expectation of privacy in bailed or entrusted property.

In *United States v. Wilson*, 536 F.2d 883 (9th Cir. 1976), the court indicated that one defendant could have a reasonable expectation of privacy in his co-defendant's suitcase if he had entrusted his belongings to the co-defendant for storage in that suitcase. *Id.* at p. 885. See also, *United States v. Grunsfeld*, 558 F.2d 1231 (6th Cir. 1977) where the court held that the defendant might have established a legitimate expectation of privacy in the premises searched if he had alleged a sufficient possessory right in a machine seized from his co-defendant's house. *Id.* at p. 1241.

A case involving facts very similar to the present case is *United States v. Harwood*, 470 F.2d 322 (10th Cir. 1972). In *Harwood, supra*, the defendant stored containers in the attic of a friend's garage. The owner of the garage had given the defendant permission to use the attic for said containers in much the same manner that Virgen Palenzuela testified she consented to the use of her house as a place to store the petitioner's cocaine. (R.VIII, pp. 805-850.)

The court in *Harwood*, relying upon *Jones, Simmons*, and *Jeffers, supra*, held that the defendant had standing to contest the search of his friend's garage which resulted in the seizure of his containers. *United States v. Harwood*, at p. 325. The facts of the present case are even stronger than *Jeffers* and *Harwood, supra*, because the petitioner not only had Virgen Palenzuela's permission to conceal the cocaine in her house, but she voluntarily aided in its concealment therein. (R.VIII, pp. 831-836.) (Appx. p. 13) In *Jeffers* and *Harwood, supra*, the expectation of privacy was necessarily diminished because of the chance that the owner of the

premises would accidentally discover the contraband nature of the bailed goods and call in law enforcement agents.

If this Court retains the *Jones* automatic standing rule, the petitioner's standing is established because he was charged with possession at the time of the contested search and seizure. If, however, the Court overrules *Jones* in the pending *Salvucci* case, the petitioner has actual standing to contest the search and seizure because *his* legitimate expectation of privacy was violated.

It is submitted that based on the foregoing authorities, the petitioner had a legitimate expectation that the goods entrusted to Virgen Palenzuela solely for his benefit would be free from governmental intrusion under *Rakas'* substantive Fourth Amendment analysis.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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MICHAEL J. OSMAN

BY /s/ ROBERT M. DUBOFF
ROBERT M. DUBOFF

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 1980, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, and to the United States Attorney, 300 Ainsley Building, Miami, Florida 33132. I further certify that all parties required to be served have been served.

MICHAEL J. OSMAN, P.A.
Counsel for Petitioner

BY /s/ MICHAEL J. OSMAN
MICHAEL J. OSMAN

Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

NO. 77-437-Cr-JLK

UNITED STATES OF AMERICA

v.

JULIO MOREJON-PACHECO, et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, JAMES LAWRENCE KING, DISTRICT JUDGE

Decided: Feb. 6, 1978

Melvyn Kessler, for defendant Julio Morejon-Pacheco.
Richard Woolf, Assistant U.S. Attorney, for plaintiff.

ORDER DENYING MOTION
TO SUPPRESS

JAMES LAWRENCE KING, District Judge.

This cause came on for consideration upon the motion of the defendants to suppress evidence. The court, having considered the record and being fully

advised in the premises, finds and concludes that the motion should be denied.

This motion was filed by the defendants Jorge Palenzuela and Virgen Palenzuela and was joined in by the remaining codefendants, Julio Morejon-Pacheco, Luis Ernesto Triana-Digas, and Rene Benitez. The matter was referred to U.S. Magistrate Sorrentino, who conducted an evidentiary hearing and filed a written report recommending that the motion be denied. All defendants filed or joined in objections to the Magistrate's report. After having carefully considered the objections, the Magistrate's report, the record, and the transcript of the evidentiary hearing, this court has concluded that the Magistrate's recommendation is correct and should be carried out.

I. *Facts*

The facts surrounding the seizure of the evidence sought to be suppressed are briefly as follows. On July 18, 1977, a Special Agent of the Drug Enforcement Agency in undercover capacity went to the home of the defendants Jorge and Virgen Palenzuela with defendants Jorge and Virgen Palenzuela with defendant Morejon in order to purchase some cocaine for which he had been negotiating as part of a conspiracy investigation. The deal was not consummated and the agent left. While he was in the home, however, he observed two packets of cocaine, a scale on which the cocaine was measured, and a glass in which a field test as to the quality of the cocaine was made. He also observed a number of people entering the house and could not be sure how many left again.

Within an hour after the agent left the house with the defendant Morejon, these five defendants were placed under arrest. Morejon and Benitez were arrested at separate locations away from the house; Triana-Digas and the Palenzuelas were arrested in the front yard of the Palenzuela home. A small crowd gathered, and the officers and the agent took the three defendants into the Palenzuela home, searching it for any other co-conspirators who might possess weapons or destroy the contraband that the agent had so recently observed in the house. The agent testified that because of the number of people who had gathered he feared for the safety of the officers and those under arrest. He also thought that there might be co-conspirators still inside the house with access to weapons as well as to the cocaine. All defendants seek to suppress the items which were seized during this search, including a loaded automatic weapon and one-half kilogram of cocaine.

II. *Standing*

A threshold issue not fully analyzed in the Magistrate's report is that of the standing of defendants Morejon-Pacheco, Triana-Digas, and Benitez to contest the seizure of the cocaine at the Palenzuelas' home. The defendants argue, the government concedes, and the Magistrate's report concludes that these three defendants have standing because they are charged in Count II of the indictment with possession of the cocaine seized with intent to distribute. The issue to be addressed here is whether the Fifth Circuit still recognizes a count of possession as conferring automatic standing, considering the recent Supreme Court decisions.

The Supreme Court created this concept of automatic standing in *Jones v. U.S.*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), to prevent a defendant from having to give up one constitutional right — protection from self-incrimination — in order to assert another — privacy. The Court sought to eliminate the situation in which a defendant was required to prove what amounted to an essential element of the government's case against him in order to contest an allegedly illegal search and seizure. This protection was fully developed in 1968 when the Court held that "testimony given by a defendant to meet such [standing] requirements should not be admissible against him at trial on the question of guilt or innocence." *Simmons v. U.S.*, 390 U.S. 377, 390, 88 S.Ct. 967, 974, 19 L.Ed.2d 1247 (1968).

Subsequently, Supreme Court propounded what is now the accepted test for standing under the circumstances arising in this case:

[T]here is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

Brown v U.S., 411 U.S. 223, 229, 93 S.Ct. 1565, 1569, 36 L.Ed.2d 208 (1973). However, the Court specifically declined to determine whether the *Simmons* decision "makes *Jones*' 'automatic' standing unnecessary" and

decided to "reserve that question for a case where possession at the time of the contested search and seizure is 'an essential element of the offense . . . charged.' " *Brown,* 411 U.S., at 229, 93 S.Ct., at 1569 (citing *Simmons,* 390 U.S., at 390, 88 S.Ct., at 974). This is such a case.

The circuits have split as to whether automatic standing is still available to a defendant who is charged with a possession crime but does not meet either of the other two standards. Hence, automatic standing is still the law in the Second Circuit and in the Ninth Circuit, but has been eliminated in the Sixth Circuit. *See U.S. v. Banerman,* 552 F.2d 61 (2nd Cir. 1977); *U.S. v. Jamerson,* 549 F.2d 1263 (9th Cir. 1977); *U.S. v. Delguyd,* 542 F.2d 346 (6th Cir. 1976). The Fifth Circuit had adopted the automatic standing rule established by *Jones. See U.S. v. Holmes,* 521 F.2d 859 (5th Cir. 1975). Although subsequent case law in the circuit indicates that the three *Brown* standards operate independently to accord standing (*See U.S. v. Smith,* 550 F.2d 277 (5th Cir. 1977) (no evidence offered establishing standing under "*any* of the three categories set out in *Brown*").), which would indicate that a defendant charged with a possession crime should be granted standing, the narrow question presented here is still undecided.

In *U.S. v. Archbold-Newball,* 554 F.2d 665 (5th Cir. 1977), the defendants were held not entitled to "constructive standing" derived from *Jones.* In dicta, the court quoted language from *Brown* to the effect that

> *Simmons* has removed the danger of coerced self-incrimination. We simply see no reason to

> afford such "automatic" standing where, as here, there was no risk to a defendant of either self-incrimination or prosecutorial self-contradiction. [441 U.S., at 1569, 93 S.Ct. 1565.]

554 F.2d, at 679. It would be a mistake, however, to read this language broadly and construe it to do away entirely with automatic standing: in *Archbold* the question of constructive standing was foreclosed because the defendant was not charged with an offense which included the element of possession of the seized item at the time of the seizure. *Archbold* is therefore distinguishable.

[1] Since the Supreme Court has specifically reserved the question of automatic or constructive standing where a defendant has been charged with a possession offense concerning the seized property, and since the Fifth Circuit has not construed *Brown* and *Simmons* to overrule *Jones* where the defendant/movant has been charged with a possession offense, this court concludes that *Jones,* supported by category (c) of *Brown,* still presents a viable grant of standing under these circumstances. Therefore, in the case sub judice, defendants Morejon-Pacheco, Triana-Digas, and Benitez must be accorded standing to seek suppression of the evidence seized at the Palenzuelas' house. The Palenzuelas, of course, have standing under all three categories.

III. *Motion to Suppress*

[2] This court finds that the circumstances surrounding the search and seizure are such that this

case qualifies for the "threat to safety" exception to the general rule that a warrantless search of a dwelling cannot be made incident to an arrest occurring outside the building. *See U.S. v. Bowdach,* 561 F.2d 1160 (5th Cir. 1977); *McGeehan v. Wainwright,* 526 F.2d 397 (5th Cir. 1976); *Hopkins v. Alabama,* 524 F.2d 473 (5th Cir. 1975); *United States v. Smith,* 515 F.2d 1028 (5th Cir. 1975). The record reflects that the officers had probable cause to fear for their safety and that of the suspects and bystanders. According to the Supreme Court, "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Warden v. Hayden,* 387 U.S. 294, 298 9, 87 S.Ct. 1642, 1646, 18 L.Ed.2d 782 (1967). Therefore, the Magistrate's recommendation is hereby adopted and it is

ORDERED and ADJUDGED that the defendant's motion to suppress be and the same is hereby denied.

DONE and ORDERED in chambers at the United States District Courthouse, Miami, Florida, this 6th day of February, 1978.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-5748
NO. 79-2084

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LUIS AGUIAR, JORGE PALENZUELA,
AND JULIO MOREJON-PACHECO,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VIRGEN PALENZUELA,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JULIO MOREJON-PACHECO
AND LUIS AGUIAR,
Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, JAMES LAWRENCE KING, DISTRICT JUDGE

Decided: Feb. 4, 1980

BEFORE AINSWORTH, VANCE
AND ANDERSON,
CIRCUIT JUDGES

Michael J. Osman, for defendant-appellant Morejon-Pacheco.

Bruce A. Zimet, Assistant U.S. Attorney, for plaintiff-appellee.

VANCE, Circuit Judge:

These appeals arise out of a federal prosecution of Jorge Palenzuela, Virgen Palenzuela, Luis Aguiar, Julio Morejon-Pacheco and others[1] for offenses relating to their alleged involvement in the illegal trafficking of cocaine. After a jury trial in federal district court, Aguiar, Morejon and Jorge Palenzuela were convicted of conspiracy to distribute cocaine, 21 U.S.C. §846. Aguiar and Morejon were also convicted for distributing cocaine, *id.* §841(a)(1) and 18 U.S.C. §2. Morejon additionally was convicted of possession with intent to distribute cocaine, 21 U.S.C. §841(a)(1),[2] and of the knowing use of a communications facility in the commission of a narcotic-related felony, *id.* §843(b). The case of Virgen Palenzuela, charged with conspiracy to distribute cocaine and with possession with the intent to distribute cocaine, *id.* §§841(a)(1), 846, was severed from that of her co-defendants. Her appeal is from the denial of her motion for dismissal on double jeopardy

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[1]The second superceding indictment, upon which the defendants were tried, named Jose Aleman, Luis Aguiar, Juan Basilia a/k/a Juan B. Zigler or Sigler, Augusto Gonzalez, Julio Morejon-Pacheco, Rene Benitez, Jorge Palenzuela, Virgen Palenzuela, Oscar Torres, Mariana Torres, and John Doe a/k/a Carlos, for their involvement in the illegal trafficking of cocaine. Prior to trial, Aleman entered a guilty plea. John Doe a/k/a Carlos and the Torres were not defendants in this prosecution. Benitez was convicted with appellants, but failed to appear for sentencing. Gonzalez was also convicted, but was later granted a new trial by the court because of the discovery of additional evidence. Basilia was convicted as well.

[2]The trial court granted Jorge Palenzuela's motion for judgment of acquittal on the charge of possession of cocaine with intent to distribute, 21 U.S.C. §841(a)(1).

grounds. For reasons stated below, the challenges to the trial judge's rulings are for the most part without merit. We reverse, however, the district court's decision denying Jorge Palenzuela's motion for acquittal based on the insufficiency of the evidence to sustain his conspiracy conviction.

I. Facts

In early April 1977, Agent Norman Jezzeny of the Nevada district of the Drug Enforcement Administration and Agent Jorge Fonte of the State of Nevada Division of Investigation of Narcotics began an investigation into drug trafficking in Las Vegas, Nevada. Acting in their undercover capacity, they contacted Jose Aleman in Las Vegas, introducing themselves as "men in the drug business," and subsequently expressed their interest in a drug deal. Aleman mentioned that he knew a man in Key West, Florida, that might be able to help them, and that he might arrange a meeting with this man.

Fonte and Jezzeny flew to Florida on April 26, 1977, to meet Luis Aguiar, the person introduced by Aleman. They met the next day in Key West. Because Jezzeny does not speak Spanish, Fonte translated the conversation, as he continued to do on subsequent occasions. The agents asked Aguiar about the availability of a regular supply of significant quantities of cocaine. Aguiar had none, but promised to look into some contacts for the agents. Nothing else came of this meeting, and the agents returned to Las Vegas.

They returned to Miami in June and July to meet with Aguiar. The three agreed that, if an initial

transaction for cocaine culminated successfully, the agents would begin purchasing a regular monthly supply of cocaine. Apparently realizing that alone he could not provide the agents the amounts of cocaine sought, Aguiar began seeking alternatives sources of the illicit drug.[3] At their July 15 meeting, therefore, Aguiar introduced the agents to Rene Benitez, and Aguiar told Benitez of his difficulties in procuring cocaine for the agents and asked Benitez for assistance. Benitez, in turn, brought the agents and Aguiar to Julio Morejon-Pacheco. Morejon showed Fonte and Jezzeny samples of various lots of cocaine and attempted to secure the ten kilograms of cocaine they sought. The agents, Morejon and Benitez held further discussions in subsequent days to settle the price ($380,000) and mode of exchange.

Morejon, with Benitez and the agents present, made several telephone calls on July 17, 1977, to set up the cocaine transaction. In two of these calls, Morejon spoke with individuals whom he addressed as "Mami" and "Pepi."[4] After these calls, they discussed a $25,000 deposit to hold the ten kilograms of cocaine until the next day. Saying that Aguiar wanted this transaction to go through, Benitez offered to guarantee the $25,000 deposit.

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[3]One man known only as Carlos met the agents at a Miami bar on July 14. He offered Fonte seven kilograms of cocaine, which were refused.

[4]"Pepi" was a nickname used by Jorge Palenzuela, according to the testimony of his wife, Virgen.

After a number of changes in the plans for the transaction, Benitez and Morejon told Jezzeny on the day of the transaction, July 18, that they had two safe houses. Morejon and Jezzeny would go to one house to view and inspect the cocaine, while Benitez and Fonte proceeded to the second safe house, where another man would help count the purchase money brought by Fonte. When all parties were satisfied, Fonte was to leave the money at the counting house, and Jezzeny would take the cocaine with him from the other safe house.

Jezzeny went with Morejon to the home of Jorge and Virgen Palenzuela (husband and wife). Jorge was not at home.[5] Virgen took the men to the bedroom, where she produced and displayed five and one-half (of the ten) kilograms of cocaine to Jezzeny. He weighed the cocaine on a triple-beam scale that was on Mrs. Palenzuela's dresser and performed several field tests. She then offered to give Jezzeny an extra pound of cocaine, which she obtained from a drawer in her bathroom, if he was dissatisfied with the quality of the ten kilograms.[6] The three then waited for the call from the second safe house. On the way to the "counting" house, the location of which was unknown to Fonte, Fonte mistakenly arrested Benitez, searched him and removed a piece of paper with an address written on it. Fonte proceeded to the address and knocked on the door. Mrs. Ortega, who is Mrs. Palenzuela's mother and the house's owner, opened the door.

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[5]Oscar Torres, described as an old man in a white suit, was sitting in a front room of the Palenzuela house when Jezzeny arrived. Later, Mrs. Torres arrived and joined her husband. During the cocaine transaction, the couple remained in the front room.

[6]When Jezzeny asked where the other five kilograms were, Mrs. Palenzuela responded that they were at a nearby house.

A few moments earlier, Jorge Palenzuela had called Morejon. They spoke in Spanish, and Morejon then reported to the others that they were "not there yet" (referring to Benitez and Fonte). The telephone conversation between Morejon and Jorge resumed until Jorge said "They're here," handed the telephone to Fonte and left the room. Fonte then told Morejon that the deal was off and to meet him with Jezzeny at a certain location.[7] Morejon told the others that something was wrong.

On hearing this news, Mrs. Palenzuela picked up the box containing the five and one-half kilograms of cocaine, and told Jezzeny that "I'm going to give it back to the people who own it. They have to take it someplace where it's safe." She took the box to the front of the house and gave it to Mrs. Torres, who left the house. The bonus pound remained in the house.

Shortly thereafter, Jezzeny and Morejon arrived at the designated location and met Fonte. Morejon was then arrested. Jezzeny, Fonte, other DEA agents and several uniformed police officers in six or seven police cars proceeded to the Palenzuela home. When they arrived, approximately twenty-five minutes after Jezzeny and Morejon had left, the police and agents found the Palenzuelas outside. Mr. Palenzuela was playing with the children, and Mrs. Palenzuela was talking with neighbors and Luis Triana. They immediately arrested Mr. and Mrs. Palenzuela and Mr. Triana. None of the defendants or neighbors offered any resistance nor were any of them armed. The agents next, without consent, entered the house and conducted a

[7]After Fonte left Mrs. Ortega's home, Mr. Palenzuela returned to his own home.

search of the premises that lasted about twenty minutes. The agents took the defendants through each room as they searched it. They found the pound of cocaine and $26,000 in the bathroom adjoining the bedroom. The arrests and search were both warrantless.

The trial of Virgen Palenzuela, Jorge Palenzuela, Aguiar, Benitez, Morejon, Gonzalez and Basilia commenced on September 25, 1978, before a jury in the Southern District of Florida. Following the completion of the government's case, Virgen Palenzuela informed the court that she had elected to testify. Some of her co-defendants moved for a mistrial or severance of their cases. She was cross-examined by government counsel and by counsel for Morejon.[8] At the completion of her testimony, her counsel informed the court of his intent to comment during closing argument on Morejon's failure to testify. All defendants, except Virgen, renewed the motions for a mistrial or severance.

The court, however, severed the trial of Mrs. Palenzuela and proceeded with the trial against the remaining defendants. Mrs. Palenzuela did not object, although she had not moved for the severance. The remaining defendants were convicted by the jury.

[8]Mrs. Palenzuela testified that she knew Morejon and indicted coconspirators Mr. and Mrs. Torres, and that Oscar Torres had left a package at her house to be held for Morejon. She denies knowing that the package contained cocaine, denies having discussed the deal with Jezzeny and Morejon, and denies promising to supply Jezzeny with any additional quantity of cocaine. She also testified to her husband's extreme anger upon learning of her decision to cooperate with Morejon. She concedes, however, that she acted as a nonparticipating interpreter for the two men and that she transferred the cocaine from the bathroom to the bedroom and back.

II. Severance of Virgen Palenzuela and Double Jeopardy Bar

On appeal Virgen Palenzuela argues that the trial court improperly denied her motion to dismiss the indictment. She contends that she was wrongly severed from the trial of her six co-defendants and that a retrial would violate her constitutional protection against double jeopardy. We disagree.

[1] Once jeopardy attaches, as it did for Virgen Palenzuela when the jury was sworn to try this case, *Illinois v. Somerville,* 410 U.S. 458, 467-68, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973), a criminal defendant normally will not lose the opportunity to seek a favorable verdict from the jury and will not be required to stand trial a second time, *Arizona v. Washington,* 434 U.S. 497, 503, 504, 98 S.Ct. 824, 829-30, 54 L.Ed.2d 717 (1978); *Wade v. Hunter,* 336 U.S. 684, 688-90, 69 S.Ct. 834, 93 L.Ed. 974 (1949). An exception to this rule is made if the defendant consents to a retrial, *United States v. Kessler,* 530 F.2d 1246, 1255 (5th Cir. 1976) or if a retrial before a new jury is mandated by some form of manifest necessity, *United States v. Kin Ping Cheung,* 485 F.2d 689, 690-91 (5th Cir. 1973). *E. g., Wade v. Hunter,* 336 U.S. at 690-92, 69 S.Ct. 834 (witness temporarily unavailable during war); *Simmons v. United States,* 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891) (juror prejudice); *United States v. Alford,* 516 F.2d 941, 947-49 (5th Cir. 1975) (mere convenience not enough).

[2] In *De Luna v. United States,* 308 F.2d 140 (5th Cir. 1962), we held that the fifth amendment requires severance if a defendant exercises his privilege against

self-incrimination and a co-defendant's attorney will make prejudicial comments about his privileged silence. *Id.* at 154. All parties to this action agree that Virgen's decision to testify and her attorney's proper decision to draw the jury's attention to her co-defendants' silence would penalize the fifth amendment privilege of her co-defendants and would create the sort of incompatibility between their defenses that under *De Luna* requires a severance. We believe that severance, and hence retrial, of Virgen's case was justified by the manifest necessity of protecting the fifth amendment rights of the other defendants under *De Luna* and did not violate the double jeopardy protection of Virgen.

[3] The parties disagree, however, as to *who* should have been severed. Contrary to Virgen's assertion, *De Luna* does not provide a rigid answer to this question. In light of the principles of *Arizona v. Washington,* once a severance is found to be warranted by manifest necessity, the trial court has sound discretion over who is to be retained and who is to be severed. *See* 434 U.S. at 506, 98 S.Ct. at 830 n. 18, 832-34 (1978).

[4] The trial court did not abuse its discretion in ordering Virgen's retrial. *Cf. United States v. Alford,* 516 F.2d at 947-49 (improperly considering convenience); *United States v. Kin Ping Cheung,* 485 F.2d at 691-92 (must consider alternatives to mistrial and must not facilitate the potential for prosecutorial misconduct). The fact that Virgen was the only defendant not seeking a severance, although she did not object to the severance, is simply one of many factors that properly entered the district court's decision. That

fact is not, however, dispositive. In light of the district court's thoughtful and scrupulous consideration, we affirm the decision to sever Virgen and to order her retrial. *See Arizona v. Washington,* 434 U.S. at 514-516, 98 S.Ct. at 835-36.

III. Nonseverance of Jorge Palenzuela

As previously noted, severance was necessary below. Aguiar and Morejon argue, however, that the trial court's severance of Virgen Palenzuela alone was error because Jorge remained a defendant in their case and Jorge's lawyer, who represented both Palenzuelas, retained a duty to comment on Morejon's failure to testify. This argument fails because it rests on the fallacious theory that Jorge's defense, like his wife's, was antagonistic to the defenses of Aguiar and Morejon.

[5] A trial court has a duty to sever the trials of co-defendants with mutually antagonistic defenses to preserve their rights to a fair trial. *De Luna* resists the situation in which one defendant's counsel properly wishes to contrast his client's testimony with the silence of a co-defendant, who does not want to have his fifth amendment right not to testify abridged.

[6] There is no antagonism between the defenses of Jorge and of his co-defendants. Jorge's defense — built primarily on his wife's testimony, *see* note 8 *supra* — is that he did not participate in the cocaine deal and that he was incensed by and expressly repudiated his wife's activities and her decision to allow the transaction to take place at their home. That defense of ignorance and then anger differs markedly from his wife's defense

that she had some idea of what was going on and that she had agreed to do a favor for Morejon. Thus Jorge and Virgen were not alter egos each to the other. Although Virgen's defense is antagonistic to that of Morejon and Aguiar, Jorge's defense cannot be similarly characterized. No evidence in the record supports the contention of Morejon and Aguiar that their defenses were antagonistic to Jorge's defense.

[7] The trial court's decision concerning severance is discretionary, absent a showing of unfairness resulting from the presence of mutually antagonistic defenses, which Morejon and Aguiar have not established. A decision not to sever will not be disturbed, unless the trial court abused its discretion or some prejudice resulted from trying the defendants together. *United States v. Swanson,* 572 F.2d 523, 528 (5th Cir.), *cert. denied,* 439 U.S. 849, 99 S.Ct. 152, 58 L.Ed.2d 152 (1978); *United States v. Perez,* 489 F.2d 51, 65 (5th Cir. 1973), *cert. denied sub nom. Hamilton v. United States,* 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974). That discretionary decision was made below in a manner that was sensitive both to the rights and the relations of the parties and to the impact that Jorge's defense would have on the jury's deliberations.

IV. Comments by Jorge Palenzuela's Attorney

Aguiar and Morejon claim that the following comment by counsel for Jorge Palenzuela, to which they did not object, constituted reversible error because it abridged their fifth amendment right to silence, *see Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

Mr. Morejon is lifelong friend of their family. And [Virgen Palenzuela's] father and her mother and all of her brothers, and whoever that she said that she had.

But, in any event, she told her husband what she had done. She said that her husband raised all manner of hell and told her that she surely must be crazy. And stormed out of the house.

She was under oath. *No testimony to the contrary.*

(Emphasis added.) They are mistaken.

[8] Comments that undermine a defendant's fifth amendment right to silence can vitiate a conviction. *See, e. g., United States v. Edwards,* 576 F.2d 1152, 1154 (5th Cir. 1978); *United States v. Henderson,* 565 F.2d 900, 905 (5th Cir. 1978); *De Luna v. United States,* 308 F.2d at 154. It makes no difference that the comments were made by persons other than the prosecutor, *e. g., United States v. Kaplan,* 576 F.2d 598, 600 (5th Cir. 1978), *cert. denied,* 439 U.S. 1078, 99 S.Ct. 858, 59 L.Ed.2d 47 (1979), or that the comments were indirect, *United States v. Brown,* 546 F.2d 166, 173 (5th Cir. 1977).

[9] The comments of Jorge Palenzuela's attorney, however, were not intended, and would not naturally and necessarily be viewed by a jury, as a comment on Aguiar's or Morejon's silence. *See United States v. Rochan,* 563 F.2d 1246, 1249 (5th Cir. 1977). The comments of Mr. Palenzuela's attorney clearly aimed toward two ends. First, they reminded the jury of Virgen's testimony describing Jorge's discovery of the proposed cocaine transaction and his reaction to it.

Second, they pointed out the government's lack of evidence on Jorge's involvement in the conspiracy. The lack of any purpose of commenting on his co-defendant's silence, suggested by Aguiar and Morejon, is reflected in their failure to object to the comment when it was made. That fact is significant considering the vigilant and vigorous defenses that co-defendants' counsels provided their clients, and the need to look at the comments in context. *United States v. Sorzano,* 602 F.2d 1201, 1202 (5th Cir. 1979).

[10] Because no objection was raised to the challenged comment, reversal is warranted only upon a showing of plain error. *United States v. Cook,* 592 F.2d 877, 879-80 (5th Cir.), *cert. denied,* ____ U.S. ____, 99 S.Ct. 2847, 61 L.Ed.2d 289 (1979); Fed.R.Crim.P. 52(b). *See also, Benham v. United States,* 215 F.2d 472, 473 (5th Cir. 1954). Aguiar and Morejon have neither established the occurrence of plain error below nor of any error at all. Their counsel was at most entitled to seek cautionary instructions from the trial court with respect to the challenged comments made by counsel for Jorge Palenzuela.

V. Sufficiency of the Evidence Supporting Jorge Palenzuela's Conviction

At the conclusion of the taking of the testimony in the case, the district court granted Jorge Palenzuela's motion for judgment of acquittal as to Count III, "possess[ion] with intent to distribute a controlled substance." The court, however, denied his motion for judgment of acquittal as to Count I, "conspiracy to . . . distribute multi-kilogram quantities of a Schedule II narcotic controlled substance, to-wit: cocaine."

[11] In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the government, with all reasonable inferences and credibility choices read in support of the jury's verdict. *Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Barresi,* 601 F.2d 193, 195 (5th Cir. 1979). We seek to determine whether jurors might reasonably find the evidence inconsistent with every reasonable hypothesis except that of guilt. *United States v. Lonsdale,* 577 F.2d 923, 925 (5th Cir. 1978); *United States v. Squella-Avendano,* 478 F.2d 433, 436 (5th Cir. 1973); *United States v. Sidan-Azzam,* 457 F.2d 1309, 1310 (5th Cir. 1972).

[12] Our review of the record discloses no evidence sufficient to show that Jorge had agreed to be involved in a conspiracy to distribute cocaine. The sole evidence against Mr. Palenzuela is as follows: (1) Virgen Palenzuela's uncorroborated testimony that her husband used the nickname "Pepi," the name of a party to whom Mr. Morejon spoke; (2) Jorge's presence at the home of his mother-in-law, the second safe house, at the time the counting was to have occurred; and (3) his saying, "They're here," before handing the telephone to Fonte.

The trial court specifically found that there was insufficient evidence to establish that Jorge was guilty of possessing the cocaine found in his home. The court thought, however, that the statement, "They're here," tended to indicate that Mr. Palenzuela had sufficient knowledge of the drug transaction.

In *Roberts v. United States,* 416 F.2d 1216 (5th Cir. 1969), we said:

> It is elementary that neither association with conspirators nor knowledge of illegal activity constitute proof of participation in a conspiracy.

Id. at 1220 (*citing United States v. Falcone,* 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940)). *Roberts* indicates that mere knowledge of the purpose of a conspiracy or association with conspirators, without an agreement to cooperate in the crime, is not sufficient to make one a conspirator. *United States v. Morado,* 454 F.2d 167, 175 (5th Cir.), *cert. denied,* 406 U.S. 917, 92 S.Ct. 1767, 32 L.Ed.2d 116 (1972); *see United States v. Tyler,* 505 F.2d 1329, 1332 (5th Cir. 1975). The requisite fact of intentional agreement or participation cannot "be made out by piling inference upon inference," *Ingram v. United States,* 360 U.S. 672, 680, 79 S.Ct. 1314, 1320, 3 L.Ed.2d 1503 (1959) (*quoting Direct Sales Co. v. United States,* 319 U.S. 703, 711, 63 S.Ct. 1265, 87 L.Ed. 1674 (1943)), or by "suspicion and innuendo," *United States v. Palacios,* 556 F.2d 1359, 1365 (5th Cir. 1977). *Cf. United States v. Perez,* 489 F.2d at 73 (repeated actions of participants in scheme sufficient).

On the facts of this case, insufficient evidence existed for a reasonable jury to infer that Jorge Palenzuela was a party to an illegal conspiracy. *E. g., United States v. Littrell,* 574 F.2d 828, 832-34 (5th Cir. 1978). It is tempting, although all too often wrong, to suppose that mere presence is tantamount to participation, but "actual presence at the scene of the crime is not sufficient." *United States v. Caro,* 569 F.2d

411, 418 (5th Cir. 1978). The statement "They're here," standing alone, likewise reveals nothing of consequence here. This statement could have just as easily been made by any innocent bystander. The conviction of Jorge Palenzuela must, therefore, be reversed.

VI. Search and Seizure at the Palenzuela House

A motion to suppress the evidence found at the Palenzuela home was filed on behalf of the defendants on October 7, 1977. The United States magistrate took testimony and recommended denial of the defendants' motion to suppress. The trial court entered its order denying the defendants' motion on February 6, 1978.

[13] The general rule is that a warrantless search of a dwelling cannot be made incident to an arrest occurring outside the building. An important exception to this rule is made if the delay from securing a warrant would seriously threaten the lives of the police or of others. The trial court denied suppression of the cocaine because it concluded that the requisite "threat to safety" existed in this case.

[14] Jorge Palenzuela and Morejon have attacked this decision on appeal. We conclude, however, that we need not decide the issue today. Jorge Palenzuela's conviction is reversed on other grounds. Morejon, on the other hand, has no standing to raise this question. In *Brown v. United States,* 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973), the Supreme Court articulated the accepted test for standing to contest an allegedly illegal search and seizure under the circumstances arising in this case.

> [T]here is no standing to contest a search and seizure where . . . the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

Id. at 229, 93 S.Ct. at 1569. Because Morejon does not claim and the record does not indicate that the indictment charged him with possession at the time the search occurred, he lacks standing to challenge its legality. *United States v. Hodges,* 606 F.2d 520, 523 (5th Cir. 1979); *United States v. Byers,* 606 F.2d 1130, 1132 (5th Cir. 1979). *See Rakas v. Illinois,* 439 U.S. 128, 133, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

VII. New Trial and Evidentiary Hearing Regarding Fonte

After their convictions, Aguiar and Morejon moved for a new trial. They attached to this motion a transcript of a preliminary hearing in Nevada state court involving coconspirator Aleman (charged with trafficking in heroin) during which Fonte testified. They also submitted posttrial affidavits of Aleman and Ramon Gutierrez to the effect that Fonte falsely testified at trial. They also submitted additional transcripts and reports that they claimed to establish Fonte's reputation and history of false testimony in unrelated matters.

The trial court denied the new trial motion, and did so without holding an evidentiary hearing on the accusations. Aguiar and Morejon contend that the trial court abused its discretion in failing to conduct an evidentiary hearing and, in the alternative, in denying their new trial motion. We disagree with that contention.

The heart of this challenge is the contention that Fonte's prior testimony in the Nevada proceeding was in direct conflict with, or impeaches his credibility with respect to, his testimony at the trial below. From this contention Aguiar and Morejon argue that their convictions were obtained through the government's knowing use of false evidence and perjured testimony violated the standing discovery order and *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Aguiar and Morejon also contend that Aleman, who was familiar with Fonte's prior testimony, was impermissibly "hidden" by the prosecution during the trial.

[15, 16] After a careful examination of the transcripts and affidavits, we see no significant inconsistency or discrepancy in Fonte's testimony on any material issue involved below or on any matter that constitutes impeaching evidence. Appellants' perjury argument, therefore, is groundless. To establish a violation under *Brady,* Aguiar and Morejon must establish "(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." *Moore v. Illinois,* 408 U.S. 786, 794-95, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972); *United States v. Anderson,* 574 F.2d 1347, 1353 (5th Cir. 1978). *See*

Brady v. Maryland, 373 U.S. at 87, 83 S.Ct. 1194. Assuming that appellants have established (a), they have not shown (b) and (c) because there is no reasonable likelihood that "the suppressed evidence might have affected the outcome of the trial." *United States v. Agurs,* 427 U.S. 97, 104, 96 S.Ct. 2392, 2398, 49 L.Ed.2d 342 (1976). *See id.* at 112-14, 96 S.Ct. 2392; *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *United States v. Barham,* 595 F.2d 231, 241-43 (5th Cir. 1979); *United States v. Herberman,* 583 F.2d 222, 228 (5th Cir. 1978); *Galtieri v. Wainwright,* 582 F.2d 348, 362 (5th Cir. 1978) (en banc, plurality opinion); *United States v. Anderson,* 574 F.2d 1347, 1354 (5th Cir. 1978). The undisclosed prior testimony was neither material, favorable nor exculpatory. The prior testimony similarly does not constitute "impeaching evidence." *United States v. Anderson,* 574 F.2d at 1354. The production of the earlier testimony would not have created a reasonable doubt of defendants' guilt that did not otherwise exist. *See United States v. Agurs,* 427 U.S. at 112, 96 S.Ct. 2392. No evidence suggests a government plan to hide Aleman, his testimony in the Nevada proceeding, or Ramon Gutierrez.[9] Finally, we see no reason why the district court should have held an evidentiary hearing. The trial court, therefore, did not abuse its discretion in denying the new trial motion or in not conducting an evidentiary hearing. *See United States v. Hamilton,* 559 F.2d 1370, 1373 (5th Cir. 1977).

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[9]In light of these conclusions, we need not reach the merits of the government's argument regarding due diligence. *United States v. Beasley,* 582 F.2d 337 (5th Cir. 1978).

Conclusion

The convictions of Luis Aguiar and Julio Morejon-Pacheco are affirmed, as is the district court's denial of Virgen Palenzuela's motion for dismissal. The conviction of Jorge Palenzuela is reversed.

AFFIRMED IN PART; REVERSED IN PART.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-5748
NO. 79-2084

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JULIO MOREJON-PACHECO,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, JAMES LAWRENCE KING, DISTRICT JUDGE

Decided: Feb. 4, 1980
Rehearing Denied: March 10, 1980

BEFORE AINSWORTH, VANCE AND ANDERSON, CIRCUIT JUDGES

Michael J. Osman for defendant-appellant Julio Morejon-Pacheco. Bruce A. Zimet, Assistant U.S. Attorney, for plaintiff.

RECEIVED MAR 10, 1980

FILED MAR 10, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-5748
79-2084

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JULIO MOREJON-PACHECO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion February 4, 1980,
5 Cir., 1980, 610 F.2d 1296).

(March 10, 1980)

Before AINSWORTH, VANCE and ANDERSON,
Circuit Judges.

PER CURIAM:

( )The Petition for Rehearing filed on behalf of Julio Morejon-Pacheco is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing filed on behalf of Junio Morejon-Pacheco is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

Form 704-2